LIBRARY
SUPREME COURT, U. S.

No. 994

Office-Supreme Court, U.S.
FILED
JAN 25 1968
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1967

SHIRELEY JEAN ESTES; LISHA DAWN ESTES; SHAWNA ANNETTE ESTES AND DAVID LAIRD ESTES,
Petitioners,

vs.

CAMDEN FIRE INSURANCE ASSOCIATION OF GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION LIMITED; STATE AUTOMOBILE MUTUAL INSURANCE COMPANY; FRANK M. GUSWEILER; STATE OF OHIO AND UNITED STATES OF AMERICA,
Respondents.

BRIEF OF RESPONDENT, FRANK M. GUSWEILER, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AMBROSE H. LINDHORST
LINDHORST & DREIDAME
Attorneys for Respondent, Frank M. Gusweiler
1200 American Building
Cincinnati, Ohio 45202

OF COUNSEL:
JAMES L. O'CONNELL
LINDHORST & DREIDAME
Attorneys for Respondent, Frank M. Gusweiler
1200 American Building
Cincinnati, Ohio 45202

COURT INDEX PRESS, INC. — Law Printers — 809 Walnut Street, Cincinnati, Ohio 45202

INDEX

	Page
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	2
A. Absence of Facts Alleging Actionable Conduct.	3
B. Judicial Immunity.	4
CONCLUSION	9

TABLE OF CASES

Bradley v. Fisher, 13 Wall. 335 (1872)	6, 7
Brinkman v. Drolesbaugh, 97 O.S. 171 (1918)	5
Cuiska v. Mansfield, 250 F.2d 700 (6 Cir. 1957), cert. den. 356 U.S. 937	8
Halliburton v. Norton, 302 F.2d 421 (5 Cir. 1962), cert. den. 6374 U.S. 829	4
Kenney v. Fox, 232 F.2d 388 (6 Cir. 1956), cert. den. 352 U.S. 855	8
Monroe v. Pape, 365 U.S. 167 (1961)	8
Pauling v. McElroy, 278 F.2d 252 (D.C. App. 1960), cert. den. 263 U.S. 835	4
Pierson v. Ray, 386 U.S. 547 (1967)	5, 6, 8
Rudnicki v. McCormick, 210 F. Supp. 905 D. Mass. 1962), app. dis. 3872 U.S. 226	4
Scott v. Stanfield, L.R. 3 Ex. 220, 223 (1868)	6
Tenney v. Brandhove, 341 U.S. 367 (1951)	7, 8
Voll v. Steele, 141 O.S. 293, 47 N.E.2d 991 (1943)	5
Wise v. Chicago, 308 F.2d 364 (7 Cir. 1962), cert. den. 372 U.S. 944	4

TABLE OF CONSTITUTIONAL PROVISIONS

Article IV, Constitution of the United States	4
Article VI, Constitution of the United States	4
Fourteenth Amendment, Constitution of the United States	4

TABLE OF STATUTES

	Page
15 U.S.C. § 1011-1015 (McCarran-Ferguson Insurance Regulation Act)	3
42 U.S.C. § 1983 (Civil Rights Act of 1871)	3, 5, 6, 8
Rule 8 (e) , Federal Rules of Civil Procedure	2
Rule 12(b), Federal Rules of Civil Procedure	4

TABLE OF OTHER AUTHORITIES

31 O. Jur. 2d, Judges § 88	5

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 994

SHIRELEY JEAN ESTES; LISHA DAWN ESTES; SHAWNA ANNETTE ESTES AND DAVID LAIRD ESTES,

Petitioners,

vs.

CAMDEN FIRE INSURANCE ASSOCIATION OF GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION LIMITED; STATE AUTOMOBILE MUTUAL INSURANCE COMPANY; FRANK M. GUSWEILER; STATE OF OHIO AND UNITED STATES OF AMERICA,

Respondents.

BRIEF OF RESPONDENT, FRANK M. GUSWEILER, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

QUESTION PRESENTED

Did the dismissal by the District Court of the petitioners' complaint against the respondent, Frank M. Gusweiler, (on the ground it failed to state a claim upon which relief can be granted) present any question, constitutional or otherwise, for review by this Court?

STATEMENT OF THE CASE

For the purposes of this brief, the respondent, Frank M. Gusweiler, accepts the Statement Of The Case appearing on pages 3-24 of the petition for certiorari.

We wish to add, however, that all that was before the District Court by way of facts upon the hearing of the various respondents' motions to dismiss were the allegations of the complaint, a pleading which the distinguished District Judge characterized as "long, rambling and largely incomprehensible . . . in which no attempt is made to comply with the provisions of Rule 8(e), Federal Rules of Civil Procedure, . . ." (page 34 of Appendix B of the petition for certiorari.)

Insofar as the respondent, Frank M. Gusweiler, is concerned, the only language which makes any attempt to state a cause of action against him is that found in the third count of the complaint (page 11 of the petition for certiorari). This language simply asserts the conclusion that Judge Gusweiler "intentionally and maliciously deprived the plaintiffs" of certain constitutional rights in that he "wrongfully, actively and intentionally aided a conspiracy between the defendants Camden Fire Insurance Association of General Accident Fire and Life Assurance Corporation Limited and State Automobile Mutual Insurance Company to cheat plaintiffs. . . ."

For purposes of clarification, and although it is not mentioned in the petitioners' complaint or in the petition for certiorari, Judge Gusweiler was the judge assigned to hear two personal injury cases in the Court of Common Pleas of Hamilton County, Ohio, in which the present petitioners were plaintiffs. These assignments were made by the Assignment Commissioner of that court pursuant to the rules of that court.

The complaint does not say how or when Judge Gusweiler is supposed to have deprived the petitioners of any constitutional rights; nor does it say how or when he is supposed to have conspired with the respondent-insurance carriers; nor does it say just what that claimed conspiracy consisted of.

It was upon such a state of the pleadings that the District Court granted this respondent's motion to dismiss.

ARGUMENT

There are actually two bases upon which the District Court's dismissal of the complaint against Judge Gusweiler can easily be justified. First, in spite of its great length and accusatory allegations, there are no facts in the complaint asserting any actionable conduct on the part of this respondent. Secondly, the doctrine of judicial immunity provides a complete defense to the petitioners' claims against Judge Gusweiler.

We will confine the following argument to those matters which have some bearing on the claims against this respondent. We will, therefore, refrain from any discussion of such matters as the contentions of the petitioners regarding the McCarran-Ferguson Insurance Regulation Act, 15 U.S.C., § 1011-1015.

A. Absence of Facts Alleging Actionable Conduct

Although the petitioners' complaint brands Judge Gusweiler's conduct with a series of inflammatory epithets, it never does say just what that conduct consisted of. It is never permissible for a litigant, whether he is pleading under the Civil Rights Act of 1871 or otherwise, to attempt to state a cause of action merely by pleading that a defendant "cheated" the plaintiffs. Arguments and legal conclusions

are never admitted by a motion to dismiss under Rule 12 (b), a proposition supported by such cases as *Pauling* v. *McElroy,* 278 F.2d 252 (D.C. App. 1960), cert. den. 263 U.S. 835; *Halliburton Company* v. *Norton Drilling Company,* 302 F.2d 431 (5 Cir. 1962), cert. den. 374 U.S. 829; *Wise* v. *Chicago,* 308 F.2d 364 (7 Cir. 1962), cert. den. 372 U.S. 944; and *Rudnicki* v. *McCormack,* 210 F. Supp. 905 (D. Mass. 1962), app. dis. 372 U.S. 226.

Therefore, the utter failure of the petitioners to allege a single fact of wrongdoing on the part of the respondent, Frank M. Gusweiler, justified entirely the granting of his motion to dismiss. Furthermore, such a disposition of the petitioners' complaint by the District Court raises no question for consideration by this Court. There is no suggestion that this ruling is in any way in conflict with any decision of this Court; there is no suggestion that any Court of Appeals has ruled differently than the Sixth Circuit in affirming; and there is no constitutional problem presented since a simple failure on the part of the petitioners to state their case cannot be salvaged by vague and unsupported references to Articles IV and VI of the Constitution and to the Fourteenth Amendment.

B. Judicial Immunity

It is implicit in the petitioners' complaint that, whatever acts or omissions of Judge Gusweiler are complained of, these acts or omissions were in his capacity as a Judge of the Court of Common Pleas of Hamilton County, Ohio, the court of general jurisdiction in that state. The various references to Judge Gusweiler in the petition for certiorari reaffirm the fact that the petitioners' claims against this respondent are made in his capacity as a judge.

A principle of law which is completely clear is that no civil action can be maintained against a judge for the

recovery of damages by one claiming to have been injured by his judicial action within the scope of his jurisdiction of the person and of the subject matter. This rule in Ohio is stated in 31 O. Jur. 2d, Judges § 88, and is supported by a series of cases decided by the Supreme Court of Ohio, among them *Brinkman* v. *Drolesbaugh*, 97 O.S. 171 (1918), and *Voll* v. *Steele*, 141 O.S. 293, 47 N.E.2d 991 (1943).

On pages 24 and 26 of the petition for certiorari, the petitioners contend that, when he did whatever it is of which the petitioners complain, Judge Gusweiler was acting without jurisdiction. No such allegations appeared at any point in the complaint, and one can only guess that this assertion by counsel for the petitioners is based upon his contention that certain federal and state laws dealing with the insurance industry are unconstitutional. While this contention on the part of the petitioners is patently erroneous, the unconstitutionality of the statute involved in the case decided by the defendant-judge would not deprive him of the defense of judicial immunity.

The case standing for that proposition and also clearly establishing the absence of any question for review by this Court is the decision of this Court in *Pierson* v. *Ray*, 386 U.S. 547 (1967).

In the *Pierson* case the petitioners had been convicted under a Mississippi breach of the peace statute which was later held unconstitutional. Their convictions were later reversed, and they then brought an action for damages under the Civil Rights Act of 1871, 42 U.S.C., § 1983, in the District Court against the arresting police officers and also against the police judge (Spencer) who originally convicted them. This is, of course, the very same statute relied upon by the petitioners in the courts below and in this Court. In the district court in the *Pierson* case there were jury verdicts for the defendants. The Court of Ap-

peals reversed as to the police officers but held that the defendant-judge was shielded by the doctrine of judicial immunity. The first syllabus paragraph written by this Court in the *Pierson* appeal completely destroys any argument for granting the pending petition for certiorari as to the respondent, Frank M. Gusweiler. That syllabus paragraph reads as follows:

> "The settled common-law principle that a judge is immune from liability for damages for his judicial acts was not abolished by Section 1983."

In finding no difficulty in agreeing that the defendant-judge was immune from liability for damages for his role in the convictions in the *Pierson* case, this Court, at pages 553-554 of its opinion, said this:

> "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley* v. *Fisher,* 13 Wall. 335 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.'" (*Scott* v. *Stansfield,* L.R. 3 Ex. 220, 223 (1868); quoted in *Bradley* v. *Fisher, supra,* 349, note, at 350).

After pointing out that the errors of a judge may be corrected on appeal but that a judge should not have to be in fear of claims of malice and corruption made by dissatisfied litigants, the opinion of this Court continues:

> "We do not believe that this settled principle of law was abolished by § 1983, which makes liable 'every

> person' who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held in *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine."

In footnote 8, on pages 554 and 555 of the opinion, this Court rejected the petitioners' contention that the defendant-judge had been involved in some sort of conspiracy, just as the courts below in the present case properly rejected the unsupported allegations of conspiracy with respect to the respondent, Frank M. Gusweiler.

This Court's citation of *Bradley* v. *Fisher*, 13 Wall. 335 (1872), is particularly significant since we stressed that decision in the District Court and in the Court of Appeals, arguing that the second syllabus paragraph of that case points out that, if civil actions could be maintained against a judge merely because a dissatisfied litigant saw fit to allege in his complaint that the acts of a judge were done with partiality or were malicious or corrupt, the protection essential to judicial independence would be entirely swept away. The same opinion of this Court goes on to say that few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the act which would be essential to the maintenance of the action. Therefore, the vicious nature of the charges made against the respondent, Frank M. Gusweiler, in the complaint filed in the District Court in this case do not prevent the application of the rule of judicial immunity.

We also note this Court's footnote 9, at page 555 of its opinion in the *Pierson* case. That footnote points out that since the decision in the *Tenney* case the various courts of appeals have consistently held that judicial immunity is a defense to an action under 42 U.S.C. § 1983. In our briefs in the District Court and the Court of Appeals we emphasized particularly those decisions of the Sixth Circuit so holding, including *Cuiska* v. *Mansfield,* 250 F.2d 700 (6 Cir. 1957), cert. den. 356 U.S. 937, in which the defendant-judge had presided in a criminal case, and *Kenney* v. *Fox,* 232 F.2d 388 (6 Cir. 1956), cert. den. 352 U.S. 855, in which the defendant-judge had presided in a civil case.

On pages 25 and 26 of the petition for certiorari, the petitioners cite a number of decisions in support of their position. We have examined each of these cases and find that none is even remotely close to the case at bar. Not a single one of these cases involves the claim of judicial immunity, and this applies especially to the case of *Monroe* v. *Pape,* 365 U.S. 167 (1961). In fact, in treating the questions raised regarding the three police officers in the *Pierson* case, the opinion of this Court points out that there was no claim of immunity, judicial or otherwise, considered in the *Monroe* case. That decision is, therefore, obviously not controlling in this matter, and this was recognized from the outset by the District Judge, as is disclosed from his comment appearing at page 35 in Appendix B to the petition for certiorari.

Therefore, since this Court has within the last twelve months definitively ruled that judicial immunity is available as a defense to a claim made against a judge under the Civil Rights Act of 1871, there is no valid reason why this Court need consider any question under that statute as it might apply to the respondent, Frank M. Gusweiler.

CONCLUSION

As was pointed out by the District Court (page 36 of Appendix B of the petition for certiorari), this action appears to represent the personal vendetta of counsel for the petitioners against the insurance industry in general and against the two insurer-respondents and Judge Gusweiler in particular, rather than a sincere and bona fide attempt to recover monetary damages. The allegations of the complaint and the assertions of counsel in supporting his petition for certiorari are, to say the least, totally unbelievable and astounding. On such a basis alone, this Court should deny certiorari. However, in addition thereto, we believe that we have demonstrated why this Court need not consider any question raised by the petition for certiorari, no new or undecided or publicly important issue having been presented. Therefore, it is urged that the petition for certiorari be denied.

Respectfully submitted,

AMBROSE H. LINDHORST
LINDHORST & DREIDAME
Attorneys for Respondent,
Frank M. Gusweiler
1200 American Building
Cincinnati, Ohio 45202

Of Counsel:

JAMES L. O'CONNELL
LINDHORST & DREIDAME
Attorneys for Respondent,
Frank M. Gusweiler
1200 American Building
Cincinnati, Ohio 45202